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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-651

TEAMSTERS LOCAL UNION 657,

Petitioner,

vs.

JESSE RODRIGUEZ, et al.,

Respondents.

No. 75-715

SOUTHERN CONFERENCE OF TEAMSTERS,

Petitioners,

vs.

JESSE RODRIGUEZ, et al.,

Respondents.

No. 75-718

EAST TEXAS MOTOR FREIGHT SYSTEM, INC.,

Petitioner,

vs.

JESSE RODRIGUEZ, et al.,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

N.A.A.C.P. Legal Defense and Educational Fund, Inc., hereby moves to for leave to file the attached brief as *amicus curiae.*

The N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation incorporated under the laws of the State of New York. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to Negroes suffering injustice by reason of racial discrimination. For many years attorneys of the Legal Defense Fund have represented parties in employment discrimination litigation before this Court and the lower courts. The Legal Defense Fund believes that its experience in employment discrimination litigation may be of assistance to the Court. The proposed brief is submitted in support of respondent though advancing reasons somewhat different than those relied on by the courts below.

WHEREFORE, the N.A.A.C.P. Legal Defense and Educational Fund, Inc., respectfully prays that this motion be granted, and that the attached brief be filed.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

ARGUMENT

The Writs Should Be Dismissed as Improvidently Granted.

The issues actually presented by these cases are substantially different than those which were raised in the petitions for certiorari. In June, 1972, petitioner East Texas Motor Freight (hereinafter ETMF), together with the International Brotherhood of Teamsters, was sued by the United States. The government's complaint, as the complaint in this action, alleged systematic discrimination against blacks and Mexican-Americans, and sought broad monetary and injunctive relief. In April, 1975, an extended trial was held in *United States* v. *East Texas Motor Freight System, Inc.* (hereinafter *US* v. *ETMF*); on May 28, 1975, the District Court upheld the government's claim of discrimination and awarded to minority employees at present or former road terminals injunctive relief more stringent than that awarded in this case.[1] 10 EPD ¶10,345. The parties in *US* v. *ETMF* have appealed only certain portions of the relief, and do not there contest the finding of discrimination.[2] The company in the instant case ex-

[1] Under the Fifth Circuit decision in this case, a city driver who transfers to the road will have carry over seniority dating from the point at which he had three years of truck driving experience. 505 F.2d 40, 63, n. 29, 62. Under *US* v. *ETMF*, transferring employees will have two more years of seniority, dating from the point at which they had one year of experience.

[2] The company did not appeal. The union appeal raises three questions: whether the union locals were necessary parties, whether the locals and Southern Conference were alone responsible for the seniority system, and whether the seniority relief ordered by the district court should have been based on a more individualized analysis of the employment history of each minority worker. No. 75-3332, 5th Cir.

pressly relies on *US* v. *ETMF* for its own purposes,[3] but otherwise ignores developments therein.

The evidence which petitioners assert is required to support the decision below, which they object is absent from the record in this case, is to a substantial degree present and uncontested in *US* v. *ETMF*.[4] As to certain issues and class members, the instant case has been rendered partially moot by *US* v. *ETMF*.[5] These circumstances were known to petitioners prior to the grant of certiorari, and were not disclosed to the Court. In addition, of the questions originally presented by the petitions, some have, for all practical purposes, been abandoned, and others are not supported by the record in this case. In light of these considerations, amicus believes that certiorari was improvidently granted and that the writs should be dismissed.

I. *The Company Petition*[6]

1. Reliance on "Mere Statistics"

The only question presented by the company's petition which is pressed in recognizable form in its brief is "[w]hether the Court of Appeals properly relied on undifferentiated statistical evidence in entering a finding of liability in favor of the Plaintiff class."[7] The company asserts that the sole evidence of discrimination was the mere fact that, of several hundred road drivers employed

[3] Company Brief, p. 34.

[4] Amicus has lodged with the Court a copy of the relevant portions in the record in *US* v. *ETMF*. That document, headed "Exhibit of Amicus Curiae, N.A.A.C.P. Legal Defense and Educational Fund, Inc.", is referred to hereafter as EA.

[5] See p. 6, *infra*.

[6] No. 75-718.

[7] Company Petition, pp. 3, 26-31; Company Brief, pp. 2, 37-54.

by defendant prior to 1970, none was black or Mexican-American. Such evidence, the company argues, was insufficient to constitute a *prima facie* case of discrimination against minority drivers.[8] The company's petition presented a frontal attack on the use of statistics, and suggested certiorari was appropriate to consider in broad terms the efficacy and reliability of such evidence.[9] In its brief, however, the company largely restricts its discussion to the relevance of such evidence to minority employees at city terminals,[10] and does not vigorously contest its probative value for road terminals.[11]

At the trial in *US* v. *ETMF*, Mr. George Smith, ETMF's personnel director from 1952 to 1967, testified candidly as to the policy of the company regarding the hiring of non-white road drivers:

Q. (By Mr. Gadzichowski) What was the policy of the company at that time?

A. The company, so far as road drivers was concerned, did not want to employ minorities as road drivers.

Q. When you speak of minorities, do you mean Blacks and Spanish surnamed Americans?

A. I do.

[8] Company Brief, p. 42.

[9] Company Petition, p. 30:

"In light of the growing reliance on statistical evidence to prove liability in civil rights cases and the explosion of complex, complicated class actions in this area, the Court should grant the Petition herein and articulate the burden of proof required by a class action Plaintiff, both in terms of the quantity and quality of statistical evidence necessary to produce an inference of discrimination and the additional evidence required to support that inference sufficiently to establish a *prima facie* case."

[10] Company Brief, pp. 40-49.

[11] See Company Brief, p. 46, n.15.

Q. Were you aware of that policy that the company had?

A. I was.

Q. Was there any question in your mind that that was the policy?

A. There was not.

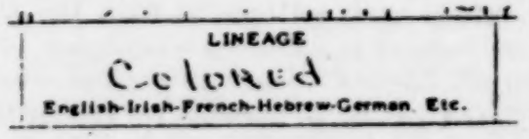
Q. And did the policy continue during your tenure at East Texas Motor Freight?

A. It did.

Q. Was it still in existence at the time you left?

A. It was.[12]

The government offered a 1966 memorandum to Smith from ETMF's Atlanta office describing a black driver and concluding, "So the long and short of it is that if and when we must hire colored boys, this one would be a good one . . ." [13] At least until 1963 this policy of discrimination was implemented by an ETMF application form which required the prospective employee to state his race in the following box:[14]



Black employees testified that they were expressly told road driver jobs, both permanent and casual, were for whites only.[15]

[12] EA 38.

[13] EA 276.

[14] EA 234, 236, 244, 245, 282-288.

[15] EA 75-78, 80, 127-128.

On the basis of this and other testimony, the District Court in *US* v. *ETMF*[16] concluded:

> The evidence showed that discrimination occurred against Blacks and Spanish-surnamed Americans who applied for or attempted to transfer to over-the-road jobs with ETMF and its acquired companies. When they sought to transfer, their seniority for bidding, layoff and recall purposes was lost. As a result of losing these rights, there has been little desire to transfer to over-the-road jobs. The seniority system of the Unions is a barrier to the movement of minorities from city or other bargaining unit jobs to over-the-road jobs. It effectively locks Blacks and Spanish-surnamed Americans into their jobs and means that seniority for minority employees [must be] built up in other than over-the-road bargaining units.

Neither defendant in that action appealed from this finding of discrimination.[17] The injunctive relief ordered by the District Court in *US* v. *ETMF* covers at least 76 of the 199 class members in this action,[18] and 59 of them have already entered into a cash settlement with the company.[19]

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[16] 10 EPD ¶ 10,345, p. 5416 (N.D. Tex. 1975); EA 293.

[17] See n.2, *supra*.

[18] It includes certain city drivers at the El Paso, Dallas, San Angelo, Longview, San Antonio and Houston terminals. See EA 296-312. Although a large number of trucking companies have in the past had policies forbidding transfers from city to road driver positions, most of them agreed in 1974, pursuant to a consent decree in *United States* v. *Trucking Employers, Inc.*, No. 74-453 (D.D.C.), to permit minority city drivers to transfer to the road. The validity of such policies is thus of less import than suggested by the petitions.

[19] EA 299-303. The liability of the International to the 79 covered employees is the subject of a pending appeal in *US* v. *ETMF*.

In short, petitioners are asking the Court to issue a far reaching decision as to the probative value of "mere statistics" under Title VII in a case which there is known to be massive non-statistical evidence of racial discrimination as well as an uncontested judicial finding of discrimination. Regardless of whether, in the narrowest of senses, the record could be said to present a question about the evidentiary significance of such statistics, the underlying controversy obviously does not. *McCarthy* v. *Bruner*, 323 U.S. 673 (1944). This is manifestly not an appropriate case in which to decide such matters; had the Court known of the above-described facts at the time when the certiorari petitions were under consideration, it is unlikely that certiorari would have been granted on this issue.[20]

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[20] The Company's Petition presented a related question no longer vigorously pursued, at least in its original form: "Whether the Court of Appeals, consistent with due process, may ignore a pre-trial stipulation. and *sua sponte* make a finding of liability without affording the Defendant an opportunity to present evidence to the District Court." The petition dwelt at length on the fundamental unfairness of being held liable without having an opportunity to produce evidence in opposition to the claim of class-wide discrimination. Company Petition. pp. 10-21.

In its brief, however, the Company no longer presses this contention. No specific suggestions are made as to what evidence the Company would have introduced had it "known" the question of class-wide discrimination was at issue in the district court. This is not surprising in light of the evidence in *US* v. *ETMF*. The stipulation referred to in the question presented is now relied on solely insofar as it bears on whether the court of appeals erred in approving the case as a class action. Company Brief, pp. 14, 25. Although the company asserts that it "concentrated" its defense on the qualifications of the named plaintiffs, Company Brief, p. 25, the record establishes that this was not the case. App. 141-193. The company now concedes that the Fifth Circuit decision affords it an opportunity, at the second stage of this bifurcated proceeding, to introduce evidence that, because of a lack of interest or qualification, any individual class member was not injured by the policy of hiring only white road drivers and is thus not entitled to relief. Company Brief, pp. 52-53.

2. Class Action

The question presented by the original petition was "whether absent a class action hearing or an equivalent opportunity *to present evidence* on the question of the appropriateness of the class the Court of Appeals may certify the litigation as a class action and enter a finding of liability in favor of the Plaintiff class." [21] (Emphasis added) On its face, this question indicated that the only relief to be sought, were certiorari granted, would be a decision affording petitioner an opportunity to present such evidence.

In its brief, however, the company, rather than seeking a remand for an evidentiary hearing, now urges that this Court reinstate the district court's denial of class action treatment.[22] The company advances nine legal arguments as to why this case is not an appropriate class action.[23] The company also offers four reasons why the scope of the class should be narrowed.[24] These, however, are not the

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[21] Company Petition, p. 3.

[22] Company Brief, pp. 13-36.

[23] (1) That plaintiffs abandoned the class aspect by inaction. Company Brief, p. 15, n. 3, 28. (2) That plaintiffs stipulated it was not to be a class action. *Id.*, p. 16. (3) That plaintiffs violated their responsibility under Rule 23 to move for a class action determination. *Id.*, pp. 14, 16, 18-21. (4) That the case was not in fact tried as a class action. *Id.*, pp. 25, 29, 37. (5) That the district court acted within its discretion. *Id.*, pp. 15, 23. (6) That plaintiffs failed to adduce evidence to support a class action. *Id.*, pp. 14, 16-18. (7) That the court of appeals erred in stating the propriety of a class action was uncontested. *Id.*, p. 30. (8) That all Title VII suits are not appropriate class actions. *Id.*, pp. 31-32. (9) That a class should not be certified after a decision on the merits. *Id.*, p. 27.

[24] (1) That there may be different types of discrimination at each terminal. *Id.*, p. 33. (2) That city drivers at road terminals are covered by *US* v. *ETMF*. *Id.*, p. 34. (3) That the interests of city drivers at road terminals conflict with those of city drivers at city terminals. *Id.*, pp. 34-35. (4) That most applicants for driving jobs only want to work in the town where they apply. *Id.*, pp. 35-36.

questions regarding which certiorari was sought and granted.

The company's 67 page brief contains a single sentence *pro forma* objection to the alleged denial of an opportunity to present argument and evidence.[25] In fact, however, the company in the Fifth Circuit did brief extensively the question of or whether this case was a proper class action.[26] Legal argument was also presented on the propriety of a class action in the Company's Petition for Rehearing and Suggestion for Rehearing En Banc,[27] and that Petition offered no intimation that the company had in any way been prevented from advancing legal argument in its brief or petition in the Fifth Circuit. The company has yet to offer any indication as to what evidence it would have wanted to introduce as to the propriety of a class action, why it would have been relevant, or even whether it has or would seek to introduce such evidence on remand. If, by any chance, the company has relevant evidence and can demonstrate on remand that the earlier proceedings provided no adequate notice that the evidence was called for, the company may introduce it and seek appropriate modification of the class action order under Rule 60(b)(6), Federal Rules of Civil Procedure.

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[25] Company Brief, p. 29.

[26] Brief of Appellee-Defendant East Texas Motor Freight System, Inc., No. 73-2801, pp. 11-18; EA 313-321.

[27] Pp. 12-15; EA 322-326. Many of the arguments advanced in this Court in opposition to class action treatment were not advanced below, despite ample opportunity to do so. The Company's real grievance seems to be not that it had no such opportunity, but that it failed to put the opportunity to good use.

3. The City-Road No Transfer Rule

The company argues that its rule prohibiting employees from transferring from jobs as city drivers to positions as road drivers was adopted in order to "maintain" the higher standards adopted two decades ago for road drivers because of a serious accident problem.[28] The rule is of vital importance to minority drivers, since it prevents them from moving from the lower paid city driver jobs, to which they were confined on the basis of race until at least 1974, into the more lucrative road jobs.[29] What relevance this contention has to the questions presented is not apparent.

In any event, this explanation has no basis in fact. On its face it is unpersuasive, for higher age, experience or other standards for road drivers could be preserved merely by providing that a city driver could transfer to the road only if he met the higher standards. The Appendix page cited by the company in support of this explanation contains neither reference to differences in standards nor testimony with regard to ETMF's safety record in the 1950's; rather, the rule is there explained as a way to maintain continuity of relationships between city drivers and their customers, an argument long ago abandoned. App. 167. The previous page of the testimony offers as the primary reason for the rule a paternalistic desire to protect the "best interest" of city employees who might be foolishly tempted by the higher wages of road jobs to give up their

[28] Company Brief, p. 7; Company Petition, p. 7.

[29] In *US* v. *ETMF*, the company stipulated average earnings at 5 typical terminals were as follows:

Classification	*1970*	*1971*	*1972*
Road Driver	$12,368	$15,333	$18,100
City Employee (City driver, etc.)	9,348	11,339	12,952

It further stipulated that average road driver out of pocket expenses in 1972 were about $50.00 a week. EA 289-291.

city seniority and neglect their "family responsibilities". App. 166.

The actual reason for the rule was candidly disclosed in *US* v. *ETMF* by the former company official who was ETMF's personnel director when the rule was adopted:

> Q. Do you know why that No Transfer Policy was put forth and implemented?
>
> A. Yes, to prevent Blacks who are in the city operation transfering to the road operation.
>
> Q. Is there a specific city operation that Blacks were seeking to transfer from the city to the road?
>
> A. St. Louis, among others.[30]

Although the Southern Conference urges that all drivers "prefer" the "traditional" [31] separation of city and road jobs, with a loss of seniority for any transferring employee, that is not so. Teamster contracts road and city rosters are merged in the northeast and for certain midwest companies, and transfers without seniority loss are authorized in several states.[32]

4. The Inter-Terminal No Transfer Rule

The Company expressly recognized in its petition that, if there were a past policy of not hiring minority road drivers, the prohibition against transfers between terminals would have an impermissible "lock in" effect if "minority drivers were hired in city-driver-only terminals in dispro-

[30] EA 47. There is substantial evidence that whites were in fact allowed to transfer to the road after adoption of the no-transfer rule. See EA 85, 98-100, 104, 156, 163, 228, 233-274.

[31] Southern Conference Petition, 8-9.

[32] See, e.g., *United States* v. *Central Motor Lines, Inc.*, 4 EPD ¶ 7624, p. 5441 (W.D.N.C. 1971); *United States* v. *Terminal Transport Co.*, 11 EPD ¶ 10,704, p. 6940, n. 9 (N.D. Ga. 1976).

portionate numbers."[33] The company advises the Court that "There is no evidence in the record to support such an assertion."[34] The Southern Conference alleges that the number of minority city drivers at each terminal "generally reflected the racial-national origin make-up of the respective communities in which the terminals are located.[35] Both of these assertions are refuted by the record in this case.

Of the black drivers in Texas, 91.58% (87 of 95) work at city only terminals, as do 66.46% of Mexican Americans (68 of 104). Only 36.95% of white drivers work at city only terminals (211 of 571).[36] This is precisely the disproportionate concentration of minority drivers at city only terminals that the company properly recognized would require abandonment of the prohibition against inter-terminal transfers.

Neither is it the case, as suggested by the Southern Conference, that minority city drivers are evenly distributed among the 20 terminals with city drivers. On the contrary, 87.36% of all black city drivers work at just 2 terminals, Houston and San Antonio; 86.53% of all Mexican-American drivers work at Houston, San Antonio or El Paso. There are 13 city terminals with *no* minority city drivers, compared to 138 white city drivers. Minority employees constitute 76.65% of all city drivers at Houston, San Antonio, and El Paso, and only 7.26% of the city drivers at the remaining 17 terminals. As a practical matter, city driver was a non-white job in those three terminals, and a white job everywhere else. Nor can this pattern be explained by variations in the population; at the 13 terminals with no

[33] Company Brief, p. 40, n. 10; Company Petition, pp. 18, 27.

[34] Company Brief, p. 40, n. 10.

[35] Southern Conference Brief, p. 8.

[36] See p. 1a, infra.

minority drivers, blacks and Mexican-Americans constitute 24.76% of the population. See p. 1a, *infra*.

The company suggests that its failure to hire virtually any minority road drivers may be the result of an absence of minority truck drivers in Texas. Census data reveals, however, that 39.62% of all truck drivers in the state are black or Mexican-American,[37] compared to 26.06% of all ETMF truck drivers and 1.64% of ETMF road drivers. In the 18 cities, other than Houston, San Antonio, and El Paso, where only 7.26% of ETMF's drivers were non-white, 39.40% of the drivers in the area were non-white. In the 13 cities where *none* of ETMF's drivers were black or Mexican-American, 32.19% of the area drivers were black or Mexican-American. See, p. 2a, *infra*.

5. The Individual Claims

The company has briefed at length the question of whether it was guilty of discrimination against the individual plaintiffs.[38] It argues that each of the plaintiffs was unable to meet either the age, weight or driving record requirements,[39] and that one of them had been involved in on-the-job accidents.[40] The question of whether the court of appeals erred in its treatment of the individual claims has not the slightest relationship to any of the questions presented by the petition.

As this Court recognized in *Franks* v. *Bowman Transportation Co.*, 47 L.Ed.2d 444, 446, n. 32 (1976),[41] a company cannot ground its refusal to hire a black appli-

[37] United States Census of Population, 1970, vol. 45, Texas, Tables 171, 179, pp. 1583, 1819-21.

[38] Company Brief, pp. 55-66.

[39] Id., pp. 63; see also 21-22, n. 6.

[40] Id., p. 8.

[41] See, e.g., *Watkins* v. *Scott Paper Co.*, 530 F.2d 1159, 1177-78 (5th Cir. 1976) and cases cited.

cant on his failure to meet a standard or requirement which has not been uniformly applied to whites. The record in *US* v. *ETMF* reveals literally hundreds of instances in which whites were hired as road drivers who did not meet the age, weight, education or experience requirements nominally adhered to by the company.[42] In 1966 the company personnel director wrote a memorandum which stated:

> With respect to job specifications, it is recommended that they be kept flexible as in the past. Our hiring limits have always been taken as guidelines, not so specific "yes" or "no" criteria. Since we place a great deal of emphasis on the individual being considered for any position, we will wish to remain flexible enough to deviate from our "guidelines" of policy for an outstanding applicant, who may not be the "policy" age or possess the "policy" experience, etc. This practice could be a difficult one to defend, if we were ever called upon to justify non-hiring of a negro over a white for a given job. We must handle future non-selection of negro applicants over whites for the same job on a basis *other* than not meeting specific standards, in view of the fact that we have deviated from our "standards" to hire others for the same job.[43]

The director testified at trial in *US* v. *ETMF* that the standards were only informal "guidelines", and that they were often disregarded.[44] On the basis of this evidence the District Court in *US* v. *ETMF* held:

> ETMF did not strictly comply with stated company hiring standards through the years when hiring drivers

[42] EA 149-219, 227-232, 268-274.

[43] EA 279.

[44] EA 39, 56-60.

> for over-the-road jobs. Deviations may be found from every standard regarding age, education, safety record, and driving experience, although some driving experience was generally required.[45]

Although the company objects that plaintiffs are unqualified because they lack 3 years of road driving experience, in 1972 it offered to waive that requirement for any of its hundreds of city drivers at road terminals who wished to transfer to the road.[46] Clearly these allegedly "stringent"[47] standards were used, *inter alia*, as a pretext to reject qualified blacks and Mexican-Americans; they should be given no credence by this Court. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 804 (1973).

The company further suggests that the individual plaintiffs would have been treated no differently had they been qualified whites, since the San Antonio terminal employs only city drivers and cannot hire for other terminals.[48] The company director of safety, however, testified in *US* v. *ETMF* that the officials at one terminal would inform applicants of vacancies at other terminals.[49] The record in that case reflected instances in which applicants at one terminal were referred to another and in which applications were forwarded from one terminal to another.[50] Manifestly none of this would have been done for a minority driver, at San Antonio or elsewhere, who indicated an in-

[45] 10 EPD ¶ 10,345, p. 5416 (N.D. Tex. 1975); EA 293.

[46] *Compare* Company Brief, p. 8, *with* App. 73.

[47] Company Brief, pp. 6-7; Company Petition, p. 7.

[48] Company Brief, pp. 53-59.

[49] EA 147-148.

[50] EA 183 (Victor Reeves), 220-26 (James White), 228 (Robert Mckinley, Roger Amstutz), 229 (Martin Treece, Donald Taylor), 230 (James White), 232 (Donald White).

terest in road jobs which were only available at another terminal.

Although in this action the company vigorously objects to permitting the named plaintiffs to transfer to road jobs at another terminal, the consent decree signed by the company two years ago in *US* v. *ETMF* permits such transfers to all minority city drivers in Texas who sought to transfer between 1965 and 1974, regardless of whether they have road experience. App. 108, 432. Since each of the named plaintiffs applied for such a transfer in 1970, each of them is literally covered by both the consent decree and the injunctive relief ordered in *US* v. *ETMF*. Thus the company agreed in *US* v. *ETMF* to the very relief for the named plaintiffs which it here opposes.[51]

II. *The Union Petitions*

Although the Southern Conference petition presented 4 questions, the Conference has elected to pursue only two of them.[52] The abandoned questions dealt with the sufficiency of the evidence of discrimination, and thus bore on the propriety of the injunctive relief ordered by the court of appeals.[53] The two questions which the Conference has elected to pursue deal solely with whether the finding of union liability was proper in view of various factual circumstances emphasized by that petitioner.[54] The Conference urges that these circumstances compel that conclusion that company alone should bear monetary responsibility for the injury suffered by the plaintiff class.[55]

[51] Counsel for *amicus* have been unable to ascertain with certainty why this transfer has not occurred.

[52] See Southern Conference Brief, pp. 2-3, n. 2.

[53] The Conference "defers" on those questions to the arguments of the company, discussed *supra*.

[54] The Conference argues that the seniority lock-in provisions of its collective bargaining agreement never had any effect because minority employees were also locked in by the company's no transfer rule. It could, of course, be argued with equal cogency that the company rule never had any effect because of the union rule. Whichever may be the "real" cause of the inability of minority drivers to transfer, once that rule is enjoined the other rule would become operative and have to be enjoined as well.

The Conference also objects to monetary liability on the ground that the Teamsters actively support placing minority victims of discrimination in their "rightful place". Conference Brief, pp. 33-34. The record in this case reveals not a single instance in which union officials took action to prevent or remedy ETMF's flagrant policy of discrimination; the record in *US* v. *ETMF*, reveals a refusal to do so. EA 87-88, 113-119.

[55] The Conference Brief discusses at length whether the injunctive relief ordered below was excessive, an issue unrelated to the original questions presented. Conference Brief, pp. 23-36. The Conference suggests that minority city drivers who were the victims of discrimination be given carry over seniority only from the date on which they applied for road jobs. The record in *US* v. *ETMF*, however, shows, as the Conference well knows, that the company refused to permit and actively discouraged applications by non-whites for road jobs, and that minority drivers were detered from applying by the well known ETMF policy of discrimination. EA 99a, 100a, 100b, 104a, 104b, 107, 107a, 143-5.

The Local Union complains that, on the particular facts of this case, it should not be held liable. It stresses that, under the delegations of authority within the Teamsters, it is the International and Conference which negotiate the actual contracts and that they alone should be liable. The International, in *US* v. *ETMF* and in *International Brotherhood of Teamsters* v. *United States*, No. 76-636, advances the opposite contention, urging that the locals alone are liable because they are the entities which approve the contracts.

Whatever the merits of these conflicting contentions, the sole consequence of the Fifth Circuit's finding of liability against the Conference and Local is to authorize the district court to apportion some part of the total back pay liability

to them. A careful reading of the opinion below, however, reveals that the court of appeals expressly recognized the "broad discretion" of the district court in allocating back pay liability among the defendants. All of the arguments made here by the Local and Conference can be made in the district court and, if sound, might lead that court to fix the unions' financial responsibility at a nominal amount, or even place the entire responsibility on the company. Since such a decision would afford the Local and Conference all the relief they seek here, it is apparent that the questions presented by the union briefs are interlocutory in nature and that the grant of certiorari was premature. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967).

CONCLUSION

The questions actually raised by this case are not those suggested by the petitions. To a significant extent the petitioners have abandoned the questions originally presented, and now seek to litigate issues not raised by the petitions and as to which certiorari was not and would not have been granted. Certain pivotal arguments of the petitioners are without foundation in the record itself. *Phillips* v. *New York*, 362 U.S. 456 (1964). Many of the factual assertions and defenses advanced by the petitioners, though plausible within the narrow confines of the record, are manifestly insubstantial in view of the evidence and findings in *US* v. *ETMF*. In view of the fact that counsel for the company and Southern Conference were counsel in *US* v. *ETMF*, they should have disclosed the circumstances of that case in their petitions and briefs.

At best the Court is invited to write a difficult and far reaching opinion about a hypothetical case which would exist if the facts were not as they are now known to be. The invitation should be declined, and the writs of certiorari should be dismissed as improvidently granted.

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APPENDIX

ETMF Drivers

February 29, 1972

Terminal	*White Drivers*	*Black Drivers*	*Mexican American Drivers*	*City Minority Population*
Abilene: City	11	0	0	15.65%
Amarillo: City	5	0	0	11.79%
Atlanta*: City	2	0	0	—
Austin: City	8	0	0	27.50%
Beaumont: City	29	3	0	33.69%
Brownwood: City	5	0	0	11.69%
Dallas: Road	59	0	0	32.93%
City	107	5	11	
El Paso: Road	52**	0	3	60.41%
City	0	1	22	
Fort Worth: City	35	0	0	28.53%
Henderson: City	2	1	0	28.08%
Houston: City	47	73	37	37.85%
Longview: Road	32	0	0	19.95%
City	28	1	0	
Lubbock: City	8	0	0	23.34%
Lufkin: City	11	0	0	30.43%
Marshall: City	7	0	0	34.96%
Odessa: City	15	0	0	19.52%
Pecos: Road	15	0	0	52.25%
San Angelo: Road	33	0	0	24.22%
City	18	1	0	
San Antonio: City	6	10	31	59.76%
Texarkana: City	9	0	0	28.85%
Road	6	0	0	
Tyler: City	21	0	0	23.71%

* Population under 10,000, census data on minority population not published.

** This appears to include 2 Indians.

Source: App. 322, 353-415; United States Census of Population, 1970, vol. 45, Texas, Tables 40, 91, 97, 108, 112.

Appendix

Truck Drivers
At Places With ETMF Terminals
By Race

Terminal	*Total Drivers*	*Black Drivers*	*Mexican American Drivers*	*Percent Minority Drivers*
Abilene	627	18	39	9.09%
Amarillo	1,161	74	68	12.23%
Atlanta*	—	—	—	—
Austin	906	259	250	56.18%
Beaumont	865	550	17	65.54%
Brownwood**	276	7	8	5.43%
Dallas	6,381	2,674	485	47.50%
El Paso	1,795	60	1,361	79.16%
Ft. Worth	2,648	871	177	39.57%
Henderson**	230	99	***	43.04%
Houston	9,480	5,126	979	64.89%
Longview**	690	165	13	25.80%
Lubbock	981	76	176	25.69%
Lufkin**	445	154	6	35.95%
Marshall**	328	129	***	39.33%
Odessa	811	44	117	19.85%
Pecos**	358	5	329	92.73%
San Angelo	400	24	80	26.00%
San Antonio	4,002	493	2,463	74.86%
Texarkana	556	124	0	22.30%
Tyler	365	60	0	16.43%

* Population under 10,000, census data on minority population not published.

** Data for these cities includes some transportation equipment operatives other than truck drivers.

*** No Mexican-American data published.

Source: United States Census of Population, 1970, vol. 45, Texas, Tables 86, 93, 99, 105, 110, 115.